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Te Cheng Hoi v Khor Chai Koan

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HIGH COURT (PENANG) — CIVIL SUIT NO 22–27 OF 1998
ZAKARIA SAM J
22 MARCH 2011

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Civil Procedure — Case management — Failure to comply with directions made by judge — Lackadaisical attitude of defendant in dealing with case — Defendant keeping on changing counsels — Failure to file bundles of documents — Defence struck off and judgment in default entered against defendant

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Civil Procedure — Striking out — Defence — Lackadaisical attitude of defendant in dealing with case — Defendant keeping on changing counsels — Failure to file bundles of documents — Defence struck off and judgment in default entered against defendant

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The plaintiff was the registered proprietor of a piece of land ('the land'). The first defendant was an advocate and solicitor. The plaintiff and the defendant had entered into a sale and purchase agreement ('the said agreement') whereby the plaintiff agreed to sell the land to the defendant for a sum of RM1,550,000. The plaintiff at the request of the defendant had executed a memorandum of transfer in pursuance of the said agreement. The defendant was to pay a deposit of RM140,000 upon the execution of the said agreement. The defendant, however failed to pay to the plaintiff the deposit and the balance purchase price. The said memorandum of transfer executed by the plaintiff in favour of the defendant was subsequently amended without the knowledge or consent of the plaintiff to favour one Chen Chin Hoay and one Chen Siew Lee as transferees and was registered. The plaintiff filed this suit claiming against the defendant the purchase price of RM1,550,000. The defendant disputed the claim. The chronology of events showed a lackadaisical attitude of the defendant in dealing with this case. He kept on changing his counsel and due to that, solicitors for the plaintiff found it difficult to serve the cause papers on him. Up to the trial date 16 April 2010 the defendant still failed to file his own bundles of documents.

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Held, striking out the statement of defence and entering judgment in default against the defendant with costs:

(1) The defendant, who himself was a lawyer had chosen to disregard any instruction given by the SAR or DR during the case management stage. His attitude had delayed the trial of the case. He had appointed many

solicitors and all of them had discharged themselves from acting for him for lack of instructions. His bundles of documents and the statements of his ten witnesses had yet to be filed (see paras 29–30).

(2) Having good defence alone is not good enough if the defendant is not diligent enough to pursue with his defence. It was crystal clear that the defendant was not really interested in defending the plaintiff's claim. The defendant had failed to furnish the court with any satisfactory explanation or provide any reasonable excuse for the delay. Hence, the defendant gave the court no choice but to strike out his defence and enter the judgment in default against him (see paras 36, 39 & 41).

[Bahasa Malaysia summary

Plaintif adalah tuan punya berdaftar sebidang tanah ('tanah tersebut'). Defendan pertama merupakan seorang peguambela dan peguamcara. Plaintif dan defendan telah memasuki satu perjanjian jual beli ('perjanjian tersebut') di mana plaintif bersetuju menjual tanah tersebut kepada defendan dengan jumlah RM1,550,000. Atas permintaan defendan, defendan telah menandatangani memorandum pindak milik berikutan perjanjian tersebut. Defendan dikehendaki membayar deposit sebanyak RM140,000 selepas perjanjian tersebut ditandatangani. Walau bagaimanapun, defendan gagal membayar deposit dan baki harga belian kepada plaintif. Memorandum pindah milik yang ditandatangani oleh plaintif memihak kepada defendan, telah dipinda tanpa diketahui atau mendapat kebenaran daripada plaintif untuk memihak kepada Chen Chin Hoay dan Chen Siew Lee sebagai pemindah dan telah didaftar. Plaintif memfailkan tindakan ini terhadap defendan bagi menuntut harga belian berjumlah RM1,550,000. Defendan menafikan tuntutan. Kronologi peristiwa menunjukkan sikap acuh tak acuh defendan dalam kes ini. Beliau kerap bertukar peguam dan akibatnya, peguam plaintif menghadapi kesukaran untuk memfailkan ikatan dokumen.

Diputuskan, membatalkan penyata pembelaan dan memasukkan penghakiman ingkar terhadap defendan dengan kos:

(1) Defendan, yang merupakan peguam telah mengabaikan arahan yang diberikan oleh PKP atau TP semasa pengurusan kes. Sikapnya telah melambatkan perbicaraan kes. Dia telah melantik banyak peguam dan kesemuanya telah menarik diri daripada mewakilinya atas alasan tiada arahan. Ikatan-ikatan dokumen dan penyata-penyata sepuluh orang saksi-saksinya masih belum difailkan (lihat perenggan 29–30).

(2) Pembelaan yang baik sahaja tidak memadai jika defendan tidak berusaha untuk mengutarakan pembelaannya. Adalah sangat jelas bahawa defendan sebenarnya kurang berminat membela tuntutan plaintif. Defendan gagal untuk memberikan penjelasan yang memuaskan kepada mahkamah atau memberi alasan munasabah bagi penangguhan. Dengan

itu, defendan tidak memberi pilihan kepada mahkamah selain daripada membatalkan pembelaannya dan memasukkan penghakiman ingkar ke atasnya (lihat perenggan 36, 39 & 41).]

Notes

For a case on failure to comply with directions made by judge, see 2(1) *Mallal's Digest* (4th Ed 2010 Reissue) para 1800.

For cases on striking out defence, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 7501-7512

Cases referred to

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another appeal [1998] 2 MLJ 137, CA (refd)

Md Amin bin Md Yusoff & Anor v Cityvilla Sdn Bhd [2004] 4 MLJ 446, CA (refd)

Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin [1998] 4 MLJ 373, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 18, O 34, O 53, O 92 r 4

JJ Chan (Fazleeza bt Azli with him) (Shearn Delamore & Co) for the plaintiff. Defendant in person.

Zakaria Sam J:

BACKGROUND

[1] The plaintiff was at all material times the registered proprietor of the land known as Holding No 44, Mukim 14, Daerah Timur Laut, Pulau Pinang held under *perakuan pendahuluan mengenai hakmilik* ('the land').

[2] The first defendant is and was at all material times an advocate and solicitor of the High Court of Malaya practicing at the firm of Messrs Khor, Anuar & Khong, No 156, Beach Street, 10300 Penang.

THE PLAINTIFF'S CLAIM

[3] The plaintiff and the defendant had entered into a sales and purchase agreement dated 21 March 1996 ('the said agreement') whereby the plaintiff has agreed to sell the land to the defendant for a sum of RM1,550,000. The plaintiff at the request of the defendant had executed a memorandum of transfer in pursuance of the said agreement. It is a term of the agreement that the defendant shall pay a deposit of RM140,000 upon the execution of the said agreement.

[4] The defendant, however, failed to pay to the plaintiff the said deposit of RM140,000 and the balance purchase price of RM1,410,000. A

[5] By a nomination agreement dated 21 March 1996, the defendant (as donor) had without the knowledge or consent of the plaintiff nominated Chen Chin Hoay and Chen Siew Lee (as donees) to receive the transfer of the said land from the plaintiff under the said agreement. B

[6] The said memorandum of transfer executed by the plaintiff in favour of the defendant was subsequently amended without the knowledge or consent of the plaintiff to favour the said Chen Chin Hoay and Chen Siew Lee as transferees for the consideration of RM1,550,000 and was registered on 30 November1996 with the Pendaftar Hakmilik Tanah, Pulau Pinang under Presentation No 21648/96 Jilid 890 Folio 155. C D

[7] The said land has since been charged to Overseas Union Bank (M) Bhd ('the said bank') by the said Chen Chin Hoay and Chen Siew Lee on 30 November 1998 as security for a loan facility granted by the said bank to them. E

[8] The plaintiff had through his solicitor, demanded payment of the said purchase price of RM1,550,000 from the defendant, but the defendant has to date failed to comply with the said demand.

[9] The plaintiff filed this suit against the defendant claiming for the following reliefs (as per the amended statement of claim). F

(i) A declaration that the agreement in respect of the said land together with the transfer executed by the plaintiff is null and void for want of consideration; G

(ii) In the alternative, an order that the defendant do pay to the plaintiff the purchase price of RM1,550,000 as stated in the agreement and the memorandum of transfer dated 12 September 1996;

(iii) An order that the defendant do pay the plaintiff interest at the rate of 8%pa on the said purchase price of RM1,550,000 from 30 November 1996, being the date of the registration of the memorandum of transfer, to the date of final realisation. H

(iv) (Withdrawn); I

(v) (Withdrawn);

(vi) (Withdrawn);

(vii)(Withdrawn); and

A (viii) Costs.

DEFENCE

B **[10]** In his defence, the defendant stated that:

[11] The plaintiff claim is frivolous, vexatious and an abuse of the court process and mala fide.

C **[12]** The plaintiff had executed the said agreement and the memorandum of transfer as a bare trustee for one Hi Sin Ti @ Loh who had on 1 February 1996 purchased the land from the plaintiff for RM600,000 and had fully paid the purchase price to the plaintiff. The plaintiff had executed the memorandum of transfer on 1 March 1996 and duly delivered vacant possession of the said land
D to the said Hi Sin Ti @ Loh (the original purchaser).

[13] The original purchaser later sold the land to the defendant. In order to simplify the whole transaction, the original purchaser requested the plaintiff to
E execute a new memorandum of transfer to transfer the said land to the defendant since at that point of time, the land was still registered under the plaintiff's name.

[14] The plaintiff had full knowledge that he has no right over the land and
F the new transfer as he had executed the new memorandum of transfer on behalf of the original purchaser following his assignment of rights over the land to the original purchaser.

G **[15]** The plaintiff thus, was not entitled to claim the deposit and the balance purchase price of the land. The plaintiff had received RM600,000 from the original purchaser. The sub-sale was between the original purchaser and defendant.

H **[16]** The defendant was acting as trustees in the execution of the agreement for the other beneficiaries. The beneficiaries later sold the land to the said Chen Chin Hoay and Chen Siew Lee for RM1,550,000. The plaintiff was not a party to this agreement.

I **[17]** The plaintiff has no right to deny the right of the defendant to appoint nominees.

[18] The defendant denied the claim made by the plaintiff.

THE STRIKING OUT OF THE DEFENCE

[19] After protracted case managements, the deputy registrar on 10 May 2010 fixed this case for trial on 6 and 7 September 2010. On 6 September 2010 the defendant who appeared in person sought this court's indulgence to adjourn the hearing pending settlement. I refused his request. He then requested the case to be stood down for him to engage a counsel to represent him. Again I rejected his request.

[20] As the defendant was not ready to proceed with his defence, his defence was struck and judgment entered against him.

[21] Reproduced below the record of the proceedings on 6 September 2010 that lead to the judgment being entered against the defendant.

6.9.2010

Fazleza and J J. Chan for plaintiff.

Plaintiff present.

Khar Chai Koan (defendant) in person.

Defendan: Saya telah menulis kepada Mahkamah pada hari Jumaat untuk penangguhan kes ini. Saya telah diberitahu oleh Encik A J. Yeoh dari Tetuan Shearn Delamore bahawa mereka tidak mempunyai bantahan dan serahkan pada budi bicara Mahkamah.

P/C: Tiada bantahan.

Plaintif: Saya mohon kes dijalankan kerana ia merupakn satu kes yang lama.

Defendan: Seorang saksi penting saya iaitu seorang peguambela telah memberitahu saya beliau akan cuba membuat mediasi supaya kes ini dapat ditarik balik. Mohon tempoh masa yang singkat. Peguam saya telah menarik diri dan saya mengakui bahawa saya telah cuai untuk memberikan arahan kepada peguam saya. Saya telah diberitahu oleh Cik Christina Chew dari firma plaintif bahawa kes ini akan ditarik balik terhadap saya.

P/C: Cik Christina bukan dari firma kami. Saya sedia untuk menjalankan kes ini.

Defendan: Saya rasa kes dapat diselesaikan, ini akan menjimat masa Mahkamah kerana saya mempunyai 10 orang saksi. Mohon satu bulan.

Ditangguh ke Kamar

Prosiding dalam Kamar

Defendan: Saya benar-benar ingin menyelesaikan perkara ini.

Mahkamah: Jika benar hendak selesaikan perkara ini mengapa anda gagal memberi arahan kepada peguam anda Encik Subash Hassan Subra & Associates sekian lama sehingga beliau terpaksa memfailkan permohonan menarik diri dari mewakili anda kerana tiada kerjasama dari anda.

Defendan: Saya tidak kenal dan tidak tahu peguam Subash Hassan. Mungkin beliau dilantik oleh pihak ketiga bagi pihak saya.

Mahkamah: Anda telah gagal mematuhi kehendak A. 34 KMT selama ini. Bagaimana kes dapat dijalankan dengan licin tanpa sebarang ikatan dokumen dari anda, tanpa fakta-fakta yang dipersetujui dan juga penyata-penyata saksi anda seramai 10 orang. Ini akan menyulitkan Mahkamah ini untuk menentukan kelancaran kes dan ini juga tidak akan adil kepada plaintif kerana dokumen-dokumen defendan akan dikemukakan hanya di peringkat perbicaraan.

Mahkamah: Kes ditangguhkan ke Mahkamah Terbuka.

Mahkamah Terbuka

P/C: Kami memohon pembelaan defendan dibatalkan dan penghakiman ingkar dimasukkan. Ini adalah kerana defendan tidak mematuhi Aturan 34.

Defendan: Akan merupakan 'gross injustice' terhadap saya. Plaintif boleh meneruskan dengan kes mereka. Saya mohon kes ditangguh setengah jam untuk saya melantik peguam baru. Saya baru diserahkan dengan salinan penyata tuntutan yang dipinda pada 26.8.2010.

Keputusan: A. 34 KMT adalah keperluan mandatori yang tidak dipatuhi oleh defendan sekian lama. Dalam menjalankan kuasa-kuasa saya di bawah A. 34 k. 7 KMT dan 'inherent powers' Mahkamah, maka penyata pembelaan defendan dibatalkan dan penghakiman ingkar dimasukkan terhadap defendan untuk prayer (ii), (iii) dan (viii) penyata tuntutan pindaan.

[22] The plaintiff abandoned his prayer (i) ie for declaration.

CHRONOLOGY OF EVENTS

[23] For ease of reference and for better appreciation of the drastic action taken in the disposal of this case, I propose to set down chronologically in tabular form the material date and the steps taken in the plaintiff's suit.

No	Date	Chronology case
1	21 January 1998	Writ summons filed.
2	10 March 1998	Memorandum of appearance by the defendant filed
3	16 April1998	Statement of defence of the first defendant filed.
4	19 June 1998	Case against the second and third defendants was struck off.
5	14 April 1999	Summons for direction (O 53).

6	19 May 1999	Direction given for full trial.
7	10December 2004	Pre-trial case management notice under O 34 filed (encl J).
8	31 July 2008	File reconstructed. The plaintiff prayed for another date to confirm the defendant's solicitor on record. The plaintiff yet to serve encl J.
9	11 September 2008	Enclosure J yet to be served. Messrs BT Lee, Messrs Wong Chooi no longer acting for the first defendant.
10	10 January 2008	The plaintiff yet to serve encl J.
11	15 January 2009	The plaintiff yet to serve encl J.
12	25 June 2009	Pending settlement in related case 22–101 of 1999.
13	5 August 2009	Pending settlement in related case 22–101 of 1999.
14	20 October 2009	Pending settlement in related case 22-101 of 1999.
15	30 March 2010	Pending settlement in related case 22–101 of 1999 — only on cost issue.
16	28 April 2010	Settlement failed. Court gave direction for full trial. The first defendant appointed new solicitor. The first defendant will file O 18 application. Messrs Hassan Subra for the first defendant present.
17	6 May 2010	The first defendant filed notice to act in person.
18	10 May 2010	Parties yet to comply with direction. Trial date fixed on 6 and 7 September 2010.
19	19 May 2010	Notice of appointment of solicitor by Messrs Hassan Subra
20	15 June 2010	Parties yet to comply with the direction.
21	28 July 2010	Parties yet to comply with the direction. The first defendant solicitor will file SIC to discharge themselves as counsel for the first defendant.
22	11 August 2010	Parties complied with court's direction. The plaintiff proceeded file the common agreed bundles of documents since the defendant failed to response.
23	17 August 2010	SIC to discharge file as counsel for first defendant by Tn Hassan Subra & Co (encl 8).
24	19 August 2010	SIC to amend the statement of claim filed (encl10).

25	26 August 2010	Enclosure 10 allowed.
26	30 August 2010	Enclosure 8 allowed.
27	3 September 2010	The first defendant wrote in for postponement to appoint new solicitor.
28	6 September 2010	Case fixed for full trial.

[24] From the above chronology of events we could see the lackadaisical attitude of the defendant in dealing with this case.

[25] He kept on changing his counsel and due to that the solicitors for the plaintiff found it difficult to serve the cause papers on him.

On 28 April 2010 the defendant informed this court that he would file an application under O 18 of the RHC. He also appointed Messrs Hassan Subra & Associates as his solicitors. But the application was never filed.

[26] On 17 August 2010 Messrs Hassan Subra & Associates filed an application to discharge themselves as solicitors for the defendants as they failed to get any instruction from the defendant. The defendant did not contest this application. During the proceedings on 6 September 2010 the defendant told this court:

> Saya tidak kenal dan tidak tahu peguam Encik Subash Hassan. Mungkin beliau dilantik oleh pihak ketiga bagi pihak saya.

[27] The defendant did not dispute the averment of this then counsel, Encik Subash Hassan (of Messrs Hassan Subra & Associates) that the defendant failed to give instruction to him even after many letters had been sent to the defendant.

[28] Up to the trial date 16 April 2010 the defendant still failed to file his own bundles of documents. The plaintiff had to file his own bundle of documents on 11 August 2010 due to lack of response from the defendant.

[29] It is very clear that the defendant, who himself is a lawyer had chosen to disregard any instruction given by the SAR or DR during the case management stage. His attitude had delayed the trial of the case.

[30] The defendant had on 6 September 2010 requested for half an hour adjournment to engage a counsel to act for him. To me, this is another attempt by him to get an adjournment. No counsel would be able to defend him within half an hour. He had appointed many solicitors and all of them had discharged themselves from acting for him for lack of instructions. His bundles of documents and the statements of his ten witnesses had yet to be filed. How

could his defence be heard smoothly without these documents.

THE LAW

[31] On the issue of case flow management, Mokhtar Sidin JCA in delivering the judgment for the Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin* [1998] 4 MLJ 373 had this to say (at p 383):

> Recently, we came across two English decisions in respect of case flow management. The first is the (case of *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd & Ors* and *Chishty Coveney & Co v Raja* reported in The Times Law Reports, 29 December 1997 at p 698, which was a decision of the court where it was held:
>
> Pending the introduction of case flow management by the courts in April 1999, the importance of litigants observing the time limits specified by the Rules of the Supreme Court and the County Court Rules was emphasised by the Court of Appeal,
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> Lord Woolf MR said:
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> In *Departments of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897 Lord Griffiths identified the advantages which could accrue from a civil procedural process which was subject to court controlled case management techniques. That process was now being introduced. The new unified rules were intended to come into force in April 1999.
>
> However, many aspects of the process could be introduced while the existing Rules of the Supreme Court and County Court Rules were in force. Most of the powers which the court required for the purposes of case management were already contained in the existing rules.
>
> The gradual change to a managed system which was taking place did impose additional burdens upon the courts, involving the need for training and the introduction of the necessary technological infrastructure.
>
> It was therefore in the interests of litigants as a whole that the court's time was not unnecessarily absorbed in dealing with the satellite litigation which was created by non-compliance with the timetables laid down in the rules.
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> In *Birkett v James*, the consequence of inordinate delay was not a consideration which was in issue. From now on it was going to be a consideration of increasing significance.
>
> Litigants and their legal advisers had therefore to recognise that in the future any delay which occurred would be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it was, but also in relation to other litigants and the prejudice which was caused to the due administration of justice.
>
> The existing rules contained time limits which were designed to achieve the disposal of litigations within a reasonable time scale. Those rules should be observed.

[32] At p 384 the learned judge observed that:

> From our observation, it is clear to us that from the two cases there emerged an additional limb to strike out a plaintiff's claim. The original two limbs had been laid down in *Birkett v James*. We are not sure whether it is an offshoot of the second limb or it is a third limb. Be that as it may, this limb is important in view of the recent development in respect of case flow management. This new development is to overcome the backlog of cases now existing in courts in England. This new limb as we understood it to be from the two cases in that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions, too, it appears to us that there is no necessity to show prejudice in such cases. As can be seen, the law in respect of case flow management in England will only be in operation in 1999 yet the courts there had already put many aspects of its operation to use.
>
> There is no denial that in this country we have backlog of cases due to unnecessary delay. In fact, in some courts, the learned judge had taken the initiative to introduce case flow management in order to hasten the hearing of actions brought before his court. The importance of case flow management is for the parties to observe the time limits as provided by the law so that the action could be brought to trial within time. It is true that some parties had caused unnecessary delay due to non-observance of the time schedule provided by the Rules. We have amended certain provisions in the Rules of the High Court 1980 whereby time limits are given such as filing of affidavits. Our courts are definitely moving towards this case flow management era. As such, we see no reason why we should not adopt the principles stated in those two decisions.

[33] Further down at p 386, the learned judge had concluded that:

> It is clear to us that the respondent has not taken any step to dispose of the litigation within reasonable time as stated by Lord Woolf MR in the case of *Latham Bank Ltd v Trafalgar Holdings Ltd & Ors* where he said:
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> The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rutes should be observed.
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> He also said:
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> The change in culture which was already taking place would enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules was an abuse of process.
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> *While an abuse of process could be within first category identified in Birkett v James, it was also a separate ground for striking out or staying an action, which did not depend on the need to show prejudice to the defendant or that a fair trial was no longer possible*. (Emphasis added).
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> Nourse LJ in the case of *Choraria v Sethia* put it more bluntly when he said:

The law, as it applied to this case could therefore be stated thus: although inordinate and inexcusable delay alone, however great, did not amount to an abuse of process, delay which involved complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences, was capable of amounting to such an abuse, so that, if it was fair to do so, the action would be struck out or dismissed on that ground.

That was the principle on which the court had now to act. Whether it was identified as being comprehended within the first limb of *Birkett v James* or as one having an independent existence appeared to be a point of no importance.

[34] The post amendment of O 34 of the RHC had been discussed and dealt with by the Court of Appeal in *Md Amin bin Md Yusoff & Anor v Cityvilla Sdn Bhd* [2004] 4 MLJ 446 wherein it was held that (at p 451):

The procedures and powers of the High Court in pre-trial case management are provided under O 34 of the RHC which came into force on 22 September 2000 vide PU (A) 342/2000, and they are so provided so that the action could be brought to trial within time. The significance of case management procedure needs no emphasis. If emphasis is still needed then reference may be made to the recent Federal Court case of *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465 where Mohd Noor Ahmad FCJ at p 473 said:

The significance of this procedure is that it marks a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practice and procedures applicable during that stage are complied with promptly and not abused.

Whereas r 7 of this order states;

if any party to an action fails to comply with any direction given by the judge at any pre-trial conference, such order may be made against the defaulting party by the judge as meets the ends of justice.

Order 34 r 7 provides for the discretionary power of the judge to make such order against the defaulting party 'as meets the ends of justice' should any party fail to comply with any direction given by the judge at any pre-trial case management conference.

[35] Even though the above authorities were in respect of the striking out of the plaintiff's case for want of prosecution, these authorities were equally applicable to the case herein, whereby the defendant had not taken any steps to defend the plaintiff's claim in the manner expected of him.

[36] Having good defence alone is not good enough if the defendant is not diligent enough to pursue with his defence. It is crystal clear that the defendant is not really interested in defending the plaintiff's claim.

[37] Still on this issue, I wish to refer to the case of *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another appeal* [1998] 2 MLJ 137 wherein Gopal Sri Ram JCA (as he then was) in delivering the judgment for the Court of Appeal had this to say (at p 147):

> In my opinion the ratio decidendi of the Federal Court in *Public Finance Bhd v Natcom Development Sdn Bhd* clearly establishes the existence of the power in the High Court to strike out an action upon admitted or proved facts which go to show that a plaintiff is disinterested in pursuing an action he has brought.
>
> Our courts are not prepared — indeed they should not be prepared — to allow files to languish in their registries in respect of which plaintiffs have no real intention of proceeding. I agree with Mr Cherryman that such conduct would indeed amount to an abuse of process of the court. In my judgment, it is unnecessary for a defendant to show the existence of a collateral purpose in order to establish an abuse of process. Of course if a collateral purpose is established, that in itself would render the action an abuse of process for which it will be liable to be struck out. The decisions of the House of Lords in *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417 and of the English Court of Appeal in *Bishop v Felton & May* (20 June 1997, unreported) and *Governors of the National Heart and Chest Hospital v Chettle* (28 July 1997), unreported) are illustrative of the exercise of the striking out jurisdictions in this context.

[38] The above ratio decidendi was against the plaintiff but it also equally applies to the defendant herein who seemed to be dragging his feet to defend the plaintiff's claim.

[39] Furthermore, the defendant had failed to furnish this court with any satisfactory explanation or provide any reasonable excuse for the delay. The circumstances of this case, taken as a whole, support an inference that the defendant was not really interested in defending the plaintiff's claim.

[40] Order 92 r 4 of the RHC also clearly provided that:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[41] The defendant gave me no choice but to strike out his defence and entered the judgment in default against him.

[42] As for the order granted to the plaintiff on 26 August 2010 to amend his writ of summons and statement of claim and to serve the amended writ of summons and the statement of claim on 1 September 2010 a few days before the trial, the defendant should not make it an issue. The amendment sought was to reflect that the plaintiff was proceeding with his claim against the defendant only as the case against the original second and third defendants, the said Chen Chin Hoay and Chen Siew Lee had already been struck out on 19 June 1998. This fact is well within the defendant's knowledge and he would therefore not be prejudiced by the amendment.

CONCLUSION

[43] In the result, the statement of defence was struck out and judgment in default was entered against the defendant with costs.

Statement of defence struck out and judgment in default entered against defendant with costs.

Reported by Kanesh Sundrum